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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1051

THE MORRIS PLAN INDUSTRIAL BANK OF NEW YORK,

Petitioner,

—against—

HENRY H. RAPHIEL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HENRY W. PARKER,
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New York, 17, New York.

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INDEX.

TABLE OF CASES:

TEXTS:

STATUTES:

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, The Morris Plan Industrial Bank of New York, respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a petition for a writ of certiorari to review an order of the United States Circuit Court of Appeals for the Second Circuit, which reversed, on Respondent's appeal, an order denying Respondent's discharge (R. 23).

By its unanimous decision (R. 20-22), the said Circuit Court of Appeals overruled a decision which had been the law in Bankruptcy since 1916. There are no issues of fact, the conceded facts being as follows:

On November 23rd, 1943, Henry H. Raphiel, the Respondent was adjudicated a voluntary bankrupt. Objections to his discharge were filed by Petitioner, alleging that the Respondent had committed offenses punishable by imprisonment under the Bankruptcy Act, in that he had been indicted by the Grand Jury for the Southern District of New York, under indictment filed February 4th, 1929, for the crimes of knowingly and fraudulently (a) concealing from a Trustee in Bankruptcy, merchandise and moneys amounting to approximately $25,000.00, and (b) destroying documents relating to the affairs of a bankrupt, to which indictment the bankrupt had pleaded guilty, and had been sentenced to imprisonment (R. 2, 3).

The facts set forth in the Specifications were stipulated to be true at the hearing on the objections held before Referee Kurtz (R. 5).

On May 8th, 1944, an order was made by Referee Kurtz denying bankrupt's discharge (R. 8).

The Respondent petitioned for a review of the Referee's order denying discharge, contending that since some of the debts which were included in the schedule of debts filed with his voluntary petition in bankruptcy on November 23rd, 1943, were debts which had been included and provable in a prior proceeding in Bankruptcy commenced November 14th, 1928 by the filing of an involuntary Bankruptcy petition against the Respondent and one Samuel Raphiel, individually and as co-partners doing business as Raphiel Bros., out of which Bankruptcy the indictment hereinbefore mentioned arose, and in which proceeding he had not applied for a discharge, he was entitled to a limited order of discharge which would discharge him from all provable debts existing on November 23rd, 1943, except those provable in the prior bankruptcy proceeding commenced November 14th, 1928 (R. 9, 10, 11).

On said review, the order denying discharge was affirmed by Hon. Samuel Mandelbaum, a Judge of the United States District Court for the Southern District of New York. Both Referee Kurtz and Judge Mandelbaum wrote opinions (R. 7, 14, 15) and in both opinions, the opinion of the Circuit Court of Appeals for the Second Circuit, of *In re Lesser*, 234 Fed. 65, was cited.

On appeal to the United States Circuit Court of Appeals for the Second Circuit, the order of Judge Mandelbaum was reversed, and in its opinion, said Circuit Court directed that the Respondent should be granted a discharge from all debts, except those involved in the earlier bankruptcy proceeding. On December 28th, 1944, the order for mandate of said Second Circuit Court of Appeals was entered, review of which is hereby sought (R. 23).

Petitioner's claim against the Respondent arose after the filing of the 1928 petition, and accordingly the result of the action of the Circuit Court, if sustained, will be to discharge Petitioner's claim against the bankrupt.

The provisions of the Bankruptcy Act which apply to the case at bar, are as follows:

> "The court shall grant the discharge, unless satisfied that the Bankrupt has (1) committed an offense punishable by imprisonment as provided under this Act;" * * * Bankruptcy Act, Sec. 14c; 11 U. S. C. A. § 32 (c) (1); Act of June 22, 1938, c. 575; 52 Stat. 850.

and

> "Sec. 29. Offenses.— * * * b. A person shall be punished by imprisonment for a period of not to exceed five years, or by a fine of not more than $5,000, or both, upon conviction of the offense of having knowingly and fraudulently, (1) concealed from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any proceeding under this Act, any property belonging to the estate of a Bankrupt; or * * * (7) after the

filing of a proceeding under this Act or in contemplation thereof, concealed, destroyed, mutilated, falsified, or made a false entry in any document affecting or relating to the property or affairs of a Bankrupt;" * * * Bankruptcy Act, Sec. 29b; 11 U. S. C. A. § 52b; Act of June 22, 1938, c. 575; 52 Stat 856.

JURISDICTIONAL STATEMENT.

Jurisdiction to review this case upon writ of certiorari is expressly conferred upon this Court by Section 24c of the Bankruptcy Act, and under Section 240 (a) of the Judicial Code, as amended by the Act of February 13th, 1925. The order for mandate of the United States Circuit Court of Appeals for the Second Circuit in this case was made and entered on December 28th, 1944. By agreement of counsel, no mandate has issued pending decision upon this petition.

QUESTIONS PRESENTED.

On the basis of the foregoing, Petitioner desires this Court to review the following questions:

1. Whether there is any limitation of time with respect to the commission of offenses which would be a bar to a discharge, under Section 14c (1) of the Bankruptcy Act.

2. Whether the offenses which will bar a discharge must have been committed in or in connection with the bankruptcy proceeding in which the discharge is sought.

3. Whether the commission of an act which would bar a discharge in a prior proceeding is a bar, when pleaded and proved, to a discharge in a subsequent proceeding as to debts not involved in the prior proceeding?

REASONS RELIED ON FOR GRANTING THE WRIT.

This Court is requested to grant the writ for the following reasons:

1. The decision of the Circuit Court of Appeals herein is in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit on the second question presented. *In re Sieben*, 89 F. 2d 935.

2. This case involves an important question of Federal Law which has not been, but should be settled by this Court. This Court has not had occasion to pass upon the first question presented. It has denied certiorari where the same question was presented, as to a time limitation under Section 14c (3) of the Bankruptcy Act (obtaining credit on a false financial statement) *Arky* v. *Rosenberg*, 138 F. 2d 669, C. C. A. 2 cert. den. 321 U. S. 793. Ever since 1916, the decision of the Second Circuit Court of Appeals in the case of *In re Lesser*, 234 Fed. 65, has been followed as established law to the effect that a discharge will be barred for the commission of a bankruptcy offense, even though the offense was committed in another proceeding. The Seventh Circuit, in the cited case of *In re Sieben*, followed the *Lesser* case, and it was also followed by the District Court of the Eastern District of New York in 1937 in *In re Gophrener*, 20 F. Supp. 922. In the thousands of bankruptcies annually filed throughout the Country, it is important to the bar and to their clients to know how the plain language of Congress will be construed where an offense has been committed by the Bankrupt in another proceeding. In such a case, will a discharge properly be denied?

PRAYER FOR A WRIT.

Wherefore your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to the United States Circuit Court of Appeals for the Second Circuit commanding said last named Court to certify and send to this Honorable Court a full and complete transcript of the record of all proceedings in the within cause and to stand to and abide by such order and direction as to your Honors shall seem meet and the circumstances of the case require and that your Petitioner may have such other and further relief or remedy in the premises as to this Court may seem proper.

Dated: New York, N. Y., March 6th, 1945.

HENRY W. PARKER,
Attorney and Counsel for Petitioner,
56 East 42nd Street,
New York, 17, New York.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944.

No.

THE MORRIS PLAN INDUSTRIAL BANK OF NEW YORK,

Petitioner,

—against—

HENRY H. RAPHIEL,

Respondent.

BRIEF IN SUPPORT OF WRIT FOR CERTIORARI.

OPINIONS OF COURTS BELOW.

The opinions of the Referee (R. 7) and of the District Court (R. 14, 15) are not officially reported.

The opinion of the Second Circuit Court of Appeals is reported in 146 F. 2d 340.

JURISDICTION.

Jurisdiction to review this case upon writ of certiorari is expressly conferred upon this Court by Section 24c of the Bankruptcy Act, and under Section 240 (a) of the Judicial Code, as amended by the Act of February 13th, 1925. The order for mandate of the United States Circuit Court of Appeals for the Second Circuit in this case was made and entered on December 28th, 1944. By agreement of counsel, no mandate has issued pending decision upon this petition.

STATEMENT OF THE CASE.

A sufficient statement of the case will be found in the accompanying petition and in the interest of brevity will not be repeated.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals for the Second Circuit erred as follows:

1. In holding that there was a limitation of time for the commission of a bankruptcy offense which would be a bar to a discharge.

2. In holding that a bankruptcy offense which would be a bar to a discharge must be committed in or in connection with the proceeding in which the discharge is sought.

3. In holding that where a Bankrupt has committed an offense which would bar a discharge in a prior proceeding, in which no discharge was applied for, the commission of such offense may not be pleaded as a bar to a discharge in a subsequent proceeding of debts incurred since the prior proceeding.

ARGUMENT.

POINT I.

The Circuit Court of Appeals for the Second Circuit has rendered decision in the case at bar in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in the case of *In re Sieben*, 89 F. 2d 935, and in conflict with its prior decision of *In re Lesser*, 234 Fed. 65.

The first reported decision on the question involved in the second specification of error is that of the District Court for the District of South Carolina, in 1902, reported in *In*

re Blalock, 118 Fed. 679. wherein Judge Brawley held that where a bankrupt has testified falsely in another bankruptcy proceeding, such false oath may not be used as a bar to a discharge in his subsequent proceeding. In February of 1916, Judge Learned Hand, then a District Court Judge, following the *Blalock* case said, *In re Lesser*, 232 Fed. 368:

> "I sustain the exceptions to the third specification, on the ground that no perjury in a bankruptcy proceeding other than that of the bankrupt himself is ground for opposition to the discharge. In re Blalock (D. C.) 118 Fed. 679. * * * I admit that a mere literal reading of the two sections (14 & 29) might lead to a contrary result; but it is perfectly obvious that the bankrupt's discharge depends upon his conduct towards his own creditors, and not upon his general truthfulness, even in other independent proceedings."

On appeal from the District Court decision of Judge Learned Hand, the Circuit Court of Appeals for the Second Circuit per Coxe, Circuit Judge, held as follows:

> "The only question involved in this review is whether the false oath which bars the bankrupt's discharge must be made in the pending bankruptcy proceeding. The bankrupt contends for the affirmative and the petitioner for the negative of this proposition. The District Judge followed the decision in the Blalock Case (D. C.) 118 Fed. 679, in which it was held that the making of a false oath by a bankrupt in a proceeding in bankruptcy not against himself, but against a corporation of which he was an officer, was not a sufficient ground for refusing his discharge. The judge says in his opinion:
> "'I am satisfied that although it is a crime to make any false oath in any proceeding in bankruptcy, it is not a ground for refusing a discharge unless the oath be made in the bankruptcy proceedings of the bankrupt himself.'

"We are unable to agree with this ruling, principally for the reason that the statute contains no such limitation. Section 14b provides that:

"'The Judge * * * shall discharge the applicant unless he has committed an offense punishable by imprisonment as herein provided.'

"'As herein provided', means as provided under the head of 'Offenses' in Bankruptcy Act, § 29a. If a bankrupt applying for a discharge has committed an offense covered by Section 29a, his discharge must be refused. It would be an absolute impossibility for him to commit some of these offenses in his own bankruptcy. One of the offenses punished by Section 29a is the embezzlement by a Trustee in bankruptcy of property belonging to the estate of the bankrupt. If the trustee is convicted of such embezzlement and subsequently becomes a bankrupt himself, he can, if the ruling of the District Judge is correct, obtain his discharge, notwithstanding his conviction under section 29a of an offense which section 14 declares is a absolute bar to a discharge. There is nothing in the act which confines the perjury which bars a discharge to that committed in the bankrupt's own proceeding. On the contrary, many of the offenses conviction of which bars a discharge cannot, as before stated, be committed in the bankruptcy proceedings of the applicant for a discharge. We cannot think that the lawmakers intended a result so illogical as to permit a trustee, who has embezzled the estate of the bankrupt placed in his care by the court, to file a petition of his own and procure a discharge, notwithstanding his crime, because it was committed in a bankruptcy proceeding other than his own. There is nothing compelling such a construction; on the contrary a harmonious and logical interpretation of the law forbids it. The construction urged by the bankrupt would eliminate entirely many of the offenses which the law says shall bar a discharge. He might be con-

victed in another bankruptcy proceeding of perjury, or presenting a false proof of claim, of receiving money from a bankrupt after petition filed against him, of extorting money from a person for acting or forbearing to act in bankruptcy proceedings; and yet he would receive his discharge if these crimes were committed in other bankruptcy proceedings and many of them could be committed only in other proceedings. It seems to us that the construction conteded for by the bankrupt will defeat the intention of the lawmakers and involve the interpretation of the sections in question in extricable confusion. We think that the intention of the lawmakers was to refuse a discharge to a bankrupt who has taken a false oath in any bankrupt proceeding. If he can commit perjury once and succeed he will be quite likely to attempt it again. The contention that the perjury must be committed in his own bankruptcy is contrary to the letter of the law and if sustained may lead to deplorable results.

"The order is reversed and the District Court is instructed to permit an amendment to the third specification." *In re Lesser,* 234 Fed. 65 C. C. A. 2, June 6, 1916.

The decision by the Circuit Court in the *Lesser* case has been the law ever since 1916 up to the time of the decision in the instant case. Its reasoning has been followed by the text writers. "It is not necessary for the bankruptcy offense to have been committed in the identical proceeding; it may have been committed in some other bankruptcy proceeding." *Collier on Bankruptcy,* 14 Ed. Vol. I, Page 1295, Par. 14.17. "* * * and this is so even though it has been made in a bankruptcy proceeding, not his own." 8 C. J. S. Page 1409.

In 1937, the Circuit Court of Appeals for the Seventh Circuit, in deciding whether perjury by a husband in a wife's prior proceeding is a bar to relief under Section 74 in a proceeding by the husband, stated:

> "We find no case in point as to what is to be considered by the court in determining whether or not a petition is filed in good faith. We may, however, call attention to the fact that under section 29b (2) of the Bankruptcy Act, as amended, 11 U. S. C. A. § 52 (b) (2), perjury in relation to any proceeding in bankruptcy subjects the perjurer to criminal prosecution and bars his discharge in any subsequent proceeding of his own by virtue of section 14b (1), 11 U. S. C. A. § 32 (b) (1). See In re Lesser (C. C. A.) 234 F. 65. Hence, by analogy, we think the court is justified in considering the perjury here admitted, as a bar to the right of the husband to relief under section 74. There was no error in holding that the dismissal of the wife's prior petition was res adjudicata of her present rights on the question of good faith. Decree affirmed."
>
> *In re Sieben*, 89 F. 2d 935.

In the same year, 1937, Judge Byers, in the Eastern District of New York, ruled:

> "The fact that the concealment occurred in another bankruptcy proceeding, does not aid the bankrupt."
>
> *In re Gophrener*, 20 F. Supp. 922, 34 A. B. R. (N.S.) 485.

Significantly, Judge Frank in his opinion in the case at bar did not cite any authority for his statement that "Where a discharge is barred under § 14c (2)-(7) because of a wrongful act of the debtor, a future discharge will be denied only in regard to those who were creditors at the time that the wrongful act occurred, or became creditors within the time specified by the Act."

No reported decision has been found by counsel where the facts alleged in opposition to a discharge in a prior proceeding, were likewise alleged in opposition to a discharge in a subsequent proceeding. While the criminality of the bankrupt in the case at bar might have been alleged in opposition

to his discharge in the 1928 proceeding, the bankrupt chose not to tender such issue to his then creditors by failing to file a petition for discharge as then required. His conviction of the charges, however, makes his commission of such offenses *res judicata*.

Hence this case presents an unusual case of first impression on the third error specified.

POINT II.

The Circuit Court of Appeals decided an important ques- of Federal Law, which has not been, but which should be settled by this Court. None of the matters involved in the three errors specified hereinabove, nor in the questions presented in the accompanying petition appears to have been decided by this Court. In *Arky* v. *Rosenberg*, 138 F. 2d 669, C. C. A. 2, cert. den. 321 U. S. 793, the first question presented in the petition for writ of certiorari was "whether a discharge may be denied to a bankrupt upon and based on matters unconnected in any way with the proceedings before the court." In that case the discharge had been denied by the Referee, the District Judge, and the Circuit Court of Appeals for the Second Circuit on the ground that three years prior to bankruptcy, bankrupt had obtained credit by making a false financial statement, which credit so obtained had been repaid thirteen months prior to bankruptcy.

In the case at bar, the Circuit Court of Appeals has, in overruling its own logical and well considered decision in *In re Lesser*, 234 Fed. 65, so far departed from the expected and usual course of judicial proceedings, as to call for the exercise of this Court's power of supervision.

By its decision in this case, the Circuit Court has by judicial legislation attempted to put into the Bankruptcy Act as enacted by Congress a new clause, reading somewhat as follows: "14c, the court shall grant a discharge unless satisfied that the bankrupt has (1) committed *in or in connection with the proceeding in which the discharge is sought*, an

offense punishable by imprisonment as provided under this Act." (Italicized matter added by implication by the Circuit Court.)

Here the Circuit Court of Appeals for the Second Circuit has on two occasions when it was asked to determine the intention of Congress with respect to the meaning of Section 14c (1) of the Act, reached diametrically opposite results. The *Lesser* case clearly holds that the offense need not be committed in the proceeding in which the discharge is sought. In the case at bar, the same Court, although not the same judges, held that the offense must be committed in or in connection with such proceeding.

CONCLUSION.

It is respectfully submitted that the petition for writ of certiorari in this case should be granted.

Dated: New York, N. Y., March 6th, 1945.

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